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Case No. 90-6

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

BLOCK 173 ASSOCIATES,

Petitioner,

v.

THE CITY AND COUNTY OF DENVER, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RESPONDENTS' JOINT BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the actions of respondents the City and County of Denver, Mayor Federico Peña, the City Council of the City and County of Denver, the Denver Urban Renewal Authority, and BCE Development Properties Inc. in proposing an urban renewal plan, and the Denver City Council's adoption of an urban renewal plan are immune from the antitrust laws under *Parker v. Brown*, 317 U.S. 341 (1943), and its progeny?

II. Whether respondent BCE Development Properties Inc.'s petitioning of Denver officials to encourage adoption of the urban renewal plan is protected activity under the *Noerr-Pennington* doctrine?

III. Whether the urban renewal plan was rationally related to a legitimate public purpose and, therefore, under *Berman v. Parker*, 348 U.S. 26 (1954), and its progeny, did not violate petitioner's civil rights?

PARTIES

Respondent BCE Development Properties Inc. is now known as Brookfield Development Inc. The parent company of Brookfield Development Inc. is Brookfield Development Corporation, whose parent is BCE Development Corporation. Brookfield Development Inc. does not have any subsidiaries which are not wholly owned.

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RESPONDENTS' JOINT BRIEF IN OPPOSITION

Respondents the City and County of Denver, Mayor Federico Penã, the City Council of the City and County of Denver, the Denver Urban Renewal Authority, and BCE Development Properties Inc. respectfully request that the Court deny the petition for writ of certiorari.

STATEMENT OF THE CASE

This petition is the outgrowth of a local land use controversy which the petitioner fought and lost in the political arena. The petitioner is a landowner who lobbied and testified against Denver's attempt to eliminate and prevent blight through the redevelopment and revitalization of part of its

downtown area.[1] Representatives of the respondents the City and County of Denver, the Mayor of Denver, the Denver City Council, the Denver Urban Renewal Authority ("DURA"), and BCE Development Properties Inc. ("BCED"), a private developer and landowner, and others participated in the preparation of an urban renewal plan (the "Plan") which was presented to and approved by the Denver City Council on May 27, 1986.[2]

I. STATEMENT OF THE FACTS

The City and County of Denver and its leaders have long been interested in revitalizing downtown Denver. Encouraging and stimulating the downtown retail trade is one important element of that goal. (Record, F. Penã dep. at 21-23; R. Fleming dep. at 60-62.) In the early 1980's, City officials and the Denver Partnership, Inc. ("DPI"), a nonprofit civic organization, began courting national retail developers and major department stores to persuade them to build retail projects and to open department stores in downtown Denver. (App. Pet. at 24a.) At the same time, the City and DPI urged downtown property owners, including BCED and others, to develop a major retail project. (App. Pet. at 25a.)

These City officials and DPI realized from the start that neither the national retail developers nor the local landowners could, on their own, afford to build large, multi-block retail projects because of the high cost of land, the lower

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[1] Donald Oberndorf, Leo Stern, Harry Paul Wertheimer, Carol Brodie, Trust Administrator for Edith O. Wertheimer Trust, and Dottie Hammel were plaintiffs and appellants with the petitioner in the lower courts. However, they did not join in this petition and, therefore, they are respondents for the purposes of this petition. Like the petitioner, they own land in downtown Denver and they opposed the Plan in the political arena, and, later, in the actions below. These respondents are sometimes collectively referred to as the "Oberndorf Group."

[2] The City and County of Denver, Mayor Federico Penã, and the City Council are sometimes collectively referred to as the "Municipal Defendants."

return for retail projects than for office towers, and the need to make substantial concessions to anchor department store tenants in order to lure them to downtown. (App. Pet. at 24a.) They concluded that any major downtown retail project, regardless of the identity of the developer, would require substantial public financial involvement. (*Id.*) Accordingly, the City officials decided that Denver would have to form a public/private partnership if multi-block retail projects were to be built in downtown Denver. (*Id.*)

Although the City and DPI contacted many potential developers who expressed varying degrees of interest, only BCED was sufficiently interested to commit significant time and resources towards meeting with City and DURA officials, potential underwriters, and others in order to develop a proposal. (App. Pet. at 25a.) Although plans varied, BCED was considering a two or three block project, which became known as the Centerstone Project. (App. Pet. at 25a.)

Although various forms of public financing were discussed, it became clear that tax increment financing, which dedicates incremental tax revenues within an urban renewal area to repayment of bonds, was the most feasible source of public funding. (App. Pet. at 25a.) Because the Colorado urban renewal statute permits the use of tax increment financing, the Municipal Defendants, DURA, BCED, and others began to discuss the outline of an urban renewal plan, including the proposed boundaries of the urban renewal area and aspects of public financing. (App. Pet. at 25a, 26a.)

Those working on the proposed plan recognized that the Denver City Council could adopt an urban renewal plan only if the City Council found that the area which is the subject of that plan was blighted. Accordingly, in December 1985, the Denver City Council adopted a resolution directing DURA to study whether statutory blight factors existed in a 15-block area of downtown Denver and to formulate a proposed urban renewal plan for the area. (Record, Resolution No. 85.) The

resolution made the public interest in redeveloping downtown quite clear: "[T]he redevelopment of downtown is critical to the economic strength of . . . Denver." (*Id.*)

In February 1986, after examining the bids of three independent consulting firms for a survey of blight conditions in the proposed 15-block area, DURA chose HOH Associates, Inc. ("HOH") for the task. (Record, HOH Contract; G. McFadyen dep. at 135-36, 138-39.) In March 1986, HOH completed its study of blight conditions and submitted its report to DURA. The study concluded that numerous statutory blight factors existed in the area. (App. Pet. at 26a.) *See generally* C.R.S. § 31-25-103(2) (defining "blighted area" for urban renewal purposes) (App. Pet. at 74a, 75a.)

In late March, DURA's Executive Director prepared a first draft of the Plan and submitted it to various representatives of the City, BCED, bond underwriters, and their counsel for comment and analysis. (Record, G. McFadyen dep. at 199-200.) For several weeks, that group revised and refined the proposed Plan. (App. Pet. at 26a.) During that period, the petitioner, the Oberndorf Group and several other downtown property owners actively lobbied City officials in an effort to block or modify the proposed Plan. (Record, R. Crider dep. at 200-201; D. Oberndorf dep. at 80-85, 122-23.) On May 15, 1986 at a public hearing, DURA's Board of Directors passed a resolution recommending approval by the City Council of the Plan. (Record, DURA Board Minutes.)

On May 27, 1986, the Denver City Council held a public hearing concerning the Plan. (Record, City Council hearing trans. at 1.) Public notice of the hearing was given, and the petitioner, the Oberndorf Group and other opponents appeared and made extensive presentations opposing the Plan. (*Id.* at 13-25.) In their presentations, they argued that there was no blight in the area and submitted written reports of several consultants whom they had hired. (*Id.* at 17-20.) Other people spoke at the hearing in support of the Plan and HOH's determination that blight existed. (*Id.* at 9-13.)

At the conclusion of the May 27, 1986 hearing, by a vote of 9-2, the City Council enacted Ordinance No. 309, which approved the Plan. (Record, Ordinance.) In so doing, the City Council made the legislative determination that blight existed in the 15-block area and that the Plan conformed to Denver's Comprehensive Plan. *See generally* C.R.S. §§ 31-25-107(1)-(3) (App. Pet. at 86a-87a.) (Record, Plan.) The City Council also found that the Plan would eliminate and prevent the spread of blight in the urban renewal area. (Record, Plan.)

In general terms, the Plan permits DURA to use tax increment financing bonds in order to promote the construction of "retail, commercial, and related support facilities" within the Plan area. (Record, Plan at 15-20.) Subject to approval by the City, such redevelopment projects are to be built by developers pursuant to "Redevelopment Agreements" between the private developer and DURA. (*Id.* at 2-3, 14-15.) There was no Redevelopment Agreement between DURA and any developer when the Plan was approved, and no particular developer is referred to in the Plan.

Under certain circumstances, property within the urban renewal area, including the petitioner's and BCED's, can be condemned. (*Id.* at 11-12.) The Plan does not provide for the transfer of any property acquired by DURA to any particular private developer but, instead, it provides for the disposition of such property "in accordance with the provisions" of the urban renewal law. (*Id.* at 13.) Although the Plan provides for an initial "Phase I" focus on three blocks, which include BCED's and the petitioner's property, it also contemplates redevelopment throughout the urban renewal area and the resulting "continued growth and development of the central business district of the City." (*Id.* at 7-8.)

As they consistently testified at their depositions, the public officials who participated in the planning process and supported the Plan did so because they thought it was in the public interest and because it would help prevent the further

decline of downtown Denver's retail businesses.[2] Mayor Penã, in his deposition, explained that he backed the Plan because it would "strengthen our retail base," "make sure that downtown continued to be strong and viable," and increase sales tax revenues to pay for needed public services. (Record, F. Penã dep. at 22-23.)

In August 1987, over a year after the Plan was approved and the lawsuits alleging a conspiracy were filed, DURA issued an Offering Prospectus and solicited proposals from prospective developers "for the redevelopment of all or a portion of a 15-block area in downtown Denver." (Record, DURA Offering Prospectus) (App. Pet. at 28a). *See generally* C.R.S. § 31-25-106(2) (App. Pet. at 84a-85a.) Four prospective redevelopers submitted proposals to DURA by the December 2, 1987 deadline. (Record, Summary of DURA Board Decision.) On February 4, 1988, DURA announced that it would engage in "exclusive negotiations" with BCED and another potential redeveloper concerning their proposals for redevelopment in the urban renewal area. (*Id.*) DURA selected BCED for this stage of the process because BCED's proposal was best suited to meet DURA's objectives:

> [The proposed project] meets the major objectives for the urban renewal plan and the Offering Prospectus of the Denver Urban Renewal Project . . . [and] will provide the strength to the south end of the 16th Street Mall that is needed to maintain a healthy downtown retail climate. (*Id.*)

Even before it concluded its negotiations with BCED, DURA signed a Redevelopment Agreement with Cambridge Development Group ("Cambridge"), on June 23, 1988, for a project inside the 15 block urban renewal area but not for the

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[2] The City Council members who voted for the Plan and who were deposed also testified that they acted because they thought the Plan was in the best interests of Denver. (Record, K. Reynolds dep. at 21; T. Hackworth dep. at 30, 114-15; S. Foote dep. at 96; C. Donohue dep. at 56-57; R. Crider dep. at 153.)

"Phase I" blocks. (Record, Aff. of S. Powers.) DURA entered into this Redevelopment Agreement with Cambridge even though Cambridge had not assisted DURA and the Municipal Defendants in formulating the Plan. It was not until July 14, 1988 that DURA signed a Redevelopment Agreement with BCED regarding the Centerstone Project. (Record, Aff. of S. Powers.)

II. THE LITIGATION BELOW.

A. Claims Asserted in the District Court and Summary Judgment.

Shortly after the Plan was approved in May 1986, the petitioner, the Oberndorf Group, and a third group of downtown landowners, who subsequently settled their claims, filed lawsuits in both state and federal court, challenging the validity of the Plan and the activities of the Municipal Defendants, DURA and BCED in formulating and advocating the Plan. In its federal lawsuit, the petitioner alleged that the Plan violated Sections 1 and 2 of the Sherman Act by eliminating competition for the development of property within the proposed urban renewal area. (App. Pet. at 28a) The petitioner also contended that its constitutionally protected property rights were interfered with by the regulatory taking of their property in violation of the equal protection and due process clauses. (*Id.*) According to the petitioner and the Oberndorf Group, both the antitrust and civil rights violations were the product of a conspiracy among the Municipal Defendants, DURA and BCED. (*Id.*)

After extensive discovery, the Municipal Defendants, DURA, and BCED filed summary judgment motions in July 1988, and the petitioner responded. In a 20 page order filed September 19, 1988, Judge Jim R. Carrigan granted the motion for summary judgment, dismissing all of the petitioner's and Oberndorf Group's claims with prejudice. (App. Pet. at 21a-41a.)

There were four basic grounds for his ruling. *First*, he reviewed the materials submitted with the briefs and, applying this Court's recently articulated standards for the consideration of summary judgment motions, held that the petitioner and the Oberndorf Group had not met their summary judgment burden of coming forward with sufficient undisputed evidence of the alleged conspiracy. (App. Pet. at 29a, 36a, 38a, 41a)

Second, Judge Carrigan held that the defendants' actions in formulating and advocating the Plan, and the City Council's subsequent adoption of the Plan, were authorized by and in compliance with Colorado's urban renewal statute. (*Id.* at 34a-37a) Therefore, he concluded, the defendants were entitled to antitrust immunity under the state action doctrine as set forth in *Parker v. Brown*, 317 U.S. 341 (1943) and its progeny. (*Id.* at 33a, 37a)

Third, he held that BCED's conduct was protected from antitrust attack by the *Noerr-Pennington* doctrine. (*Id.* at 34a, 36a) *Fourth*, he held that the defendants did not violate the plaintiffs' civil rights because the Plan was rationally related to a legitimate public purpose: the economic revitalization of downtown Denver. (*Id.* at 38a-41a)

B. The Tenth Circuit's Decision.

The petitioner and the Oberndorf Group appealed Judge Carrigan's decision to the United States Court of Appeals for the Tenth Circuit. In that appeal, they did not raise as an issue or otherwise challenge directly Judge Carrigan's determination that, under *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), they lacked the necessary factual support for their conspiracy allegations. Rather, as they do here, they attacked it indirectly by contending that Judge Carrigan had ignored their "evidence" and had limited himself to a mere "facial" review of the legislative record. (App. Pet. at 7a). *See* Pet. at 3 ("Had either court undertaken a full review of the evidentiary record. . . . ")

After conducting a *de novo* review of the record, the 10th Circuit held that the district court had "adequately considered all of the evidence." (App. Pet. at 7a) The Court of Appeals also concluded, after its review, that there were no genuine issues of material fact which would prevent the entry of summary judgment. (*Id.* at 2a)

Applying the substantive law to those undisputed facts, the Court of Appeals agreed that state action immunity shielded the formulation and adoption of the Plan under Colorado's urban renewal statute. (*Id.* at 6a-11a) The Court of Appeals also held that the *Noerr-Pennington* doctrine protected BCED from antitrust claims. The Court of Appeals did not address whether the "co-conspirator" or "illegal activity" exceptions to the *Noerr-Pennington* doctrine should be applied because it found no factual basis to support those exceptions. (*Id.* at 11a-14a) Finally, the Court of Appeals affirmed the district court's decision that, because the Plan was rationally related to the legitimate public purpose of revitalizing downtown Denver, the civil rights challenges should be dismissed. (*Id.* at 14a-18a)

REASONS WHY THE WRIT SHOULD BE DENIED

I. THERE IS NO REASON FOR THIS COURT TO REVIEW THE TENTH CIRCUIT'S STATE ACTION IMMUNITY DECISION.

The Tenth Circuit's decision does not present this Court with the necessity, or even a meaningful opportunity, to clarify, refine, or explain its application of state action immunity to municipalities under *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985) and *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978). Nor did the Tenth Circuit create or exacerbate a split among the Court of Appeals as to how those tests should be applied.

A. This Petition is an Attempt to Continue Litigation over the Conclusions to be Drawn from Undisputed Evidence.

Far from posing a serious legal issue as to the standard to be employed by courts in reviewing a municipality's actions for the purpose of granting or denying state action immunity, the petitioner is looking for a sympathetic audience for the factual conclusions which it asserts should be attached to the undisputed evidence. According to the petitioner, it lost below only because the lower courts "ignored" its evidence that the Municipal Defendants, DURA, and BCED illegally conspired to adopt an urban renewal plan. Those courts, the petitioner asserts, would have found a conspiracy if only they had reviewed the evidence:

> Had either court undertaken a full review of the evidentiary record, as required by Rule 56 of the Federal Rules of Civil Procedure and this Court's opinions, it would have become evident that . . .

(Pet. at 3-4.)

The petitioner made the same complaint to the Tenth Circuit after the district court ruled that there was insufficient evidence of the alleged conspiracy. [3] The Tenth Circuit investigated and rejected that contention. After reviewing the factual record *de novo*, the Tenth Circuit held that the district

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[3] Although they now assert that Rule 56 should have been properly applied by the lower courts (Pet. at 3-4), the petitioner does not claim now — nor did it before the Tenth Circuit — that there were genuine issues of material fact which should have prevented summary judgment. *See E.E.O.C. v. Federal Labor Relations Auth.*, 476 U.S. 19, 24 (1986) ("Our normal practice . . . is to refrain from addressing issues not raised in the Court of Appeals.").

court had conducted a thorough factual review and considered all of the evidence:

> *Arguing that the district court refused to consider evidence that the legislative record was a sham*, landowners contend that the district court applied the wrong legal standard by limiting consideration to a facial review of the legislative record made by the City Council and DURA. *We conclude that the district court adequately considered all of the evidence* and affirm the district court's holding that state action immunity protects the Municipal defendants and BCED.

(App. Pet. at 7a, 8a) (emphasis added).

The Tenth Circuit then dissected the conspiracy allegations and the evidence which supposedly supported the petitioner's conclusions, and found it insufficient. (App. Pet. at 8a-11a.) For example, it considered and rejected petitioner's claim that the Municipal Defendants and DURA "were not attempting to eliminate blight as required by the Colorado Urban Renewal Law" and that a fraudulent urban renewal area was justified by a "sham" blight study:

> *After reviewing the record*, we conclude that the lack of blight on the Centerstone blocks and the landowners' asserted reasons [explaining why] defendants created the fifteen-block area *are not sufficient to prove the blight study was a sham.*

(App. Pet. at 8a, 9a) (emphasis added). Similarly, the Court of Appeals held that there was no evidence that alleged misrepresentations or other bad conduct occurred:

> However, *these allegations are not supported by sufficient evidence* nor do the landowners show how these instances of misrepresentation relate to their claims that the urban renewal plan was not authorized by state law.

(App. Pet. at 11a) (emphasis added). Finally and conclusively, the Tenth Circuit held that its review of the record found insufficient evidence to support the alleged conspiracy:

> *Although landowners allege that the public purposes set forth for the plan are fraudulent and that the Plan favored BCED, we do not find sufficient evidence* in the record to support the landowners' claim for a violation of civil rights *or their claim of a conspiracy.*

(App. Pet. at 18a) (emphasis added).

Therefore, the petitioner here resembles countless unsuccessful litigants who can rationalize their loss at the trial court level only by claiming that the evidence was not understood or was ignored. Such complaints, however, do not satisfy the standards for granting a writ of certiorari.

B. The Tenth Circuit's Decision Does Not Create a Conflict Among the Circuits.

Neither the Tenth Circuit's review of the facts nor its application of the state action immunity doctrine creates a conflict with any other Courts of Appeal. Nonetheless, the petitioner contends that the Fourth, Fifth, and Eighth Circuits conducted "thoughtful" or "careful" reviews of the facts to determine whether *Town of Hallie*'s tests for extending state action immunity to municipalities have been satisfied.[4] (Pet. at 17-18.) The Tenth, Ninth, and Eighth Circuits, according to the petitioner, have elected to conduct "lesser level" or "relaxed level" reviews. (Pet. at 18-19.) In reality, the petitioner is simply categorizing cases according to whether the plaintiffs won or lost.

Nothing but the result distinguishes the "relaxed" or "lesser level" Circuits from those favored by the petitioner. Both the Tenth Circuit in this case, (App. Pet. at 6a-7a), and the Ninth Circuit in *Boone v. Redevelopment Agency of City of*

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[4] See *Town of Hallie v. City of Eau Claire*, 471 U.S. at 46, 105 S.Ct., at 1720.

San Jose, 841 F.2d 886, 890 (9th Cir. 1988) *cert. denied* 488 U.S. 965 (1988) applied the standards set forth by this Court in *Town of Hallie* and *Lafayette*.[5] None of these Courts of Appeals state that, in those decisions, they are applying "lesser level" or "relaxed level" reviews. Nor do they state that they must confine themselves to reviewing the "paper record" or determining whether the municipalities merely "facially complied" with state statutes, thereby avoiding delving into a record establishing the plaintiff's conspiracy allegations. (App. Pet. at 7a-11a); *Boone v. Redevelopment Agency of City of San Jose*, 841 F.2d, at 890-891; *Scott v. City of Sioux City, Iowa*, 736 F.2d, at 1212-1216. Instead, as established above, the Tenth Circuit carefully conducted its own factual review and found each piece of the alleged conspiracy unsupported by evidence.[6](App. Pet. at 7a-11a.) Thus, the

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[5] The third "relaxed level" decision identified by petitioners, *Scott v. City of Sioux City, Iowa*, 736 F.2d 1207, 1210-1212 (8th Cir. 1984), *cert. denied*, 471 U.S. 1003 (1985), was decided before this Court's decision in *Town of Hallie*, but it applies the *Lafayette* standards.

[6] Deference to state courts' enforcement and interpretation of their statutes is not proof of an impermissibly "relaxed" review. (*See* Pet. at 20.) Instead, such deference is entirely consistent with, and demanded by, the federalism underpinnings of the state action doctrine:

> Requiring such a close examination of a state legislature's intent to determine whether the federal antitrust laws apply would be undesirable also because it would embroil the federal courts in the unnecessary interpretation of state statutes. Besides burdening the courts, it would undercut the fundamental policy of *Parker* and the state action doctrine of immunizing state action from federal antitrust scrutiny.

Town of Hallie v. City of Eau Claire, 471 U.S., at 44, n.7.

Tenth, Ninth and Eighth Circuits neither condoned nor conducted the types of limited review ascribed to them by the petitioner.[7]

Besides misrepresenting the nature and level of the Tenth Circuit's review, the petitioner attempts to create a conflict among the circuits by mischaracterizing the Fourth Circuit's decision in *Omni Outdoor Advertising v. Columbia Outdoor Advertising*, 891 F.2d 1127 (4th Cir. 1989), *cert. granted sub nom. Columbia Outdoor Advertising v. Omni Outdoor Advertising*, U.S. , 110 S.Ct. 3211 (1990). Contrary to the petitioner's implicit suggestion, the Fourth Circuit did *not* hold that *Town of Hallie*'s requirements were not satisfied or that the defendants' actions were not authorized by state

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[7] Contrary to the petitioner's assertion, the Tenth Circuit did not broaden the state action immunity doctrine by overlooking this Court's requirement in *Patrick v. Burget*, 486 U.S. 94, 108 S. Ct. 1658 (1988) that private entities be actively supervised by the state in order to be immune from antitrust attack. (*See* Pet. at 18-19, n.20.) That requirement applies when a private entity enacts the anticompetitive measure. *Patrick v. Burget*, 486 U.S., at , 108 S. Ct., at 1663. When a municipality adopts the allegedly anticompetitive measure — for example, the Denver City Council's approval of the Plan in issue here — no such active state supervision is required. *Town of Hallie v. City of Eau Claire*, 471 U.S., at 46 ("We now conclude that the active state supervision requirement should not be imposed in cases in which the actor is a municipality.").

Because the urban renewal process requires close cooperation between the public and private sectors, state action immunity has been extended to the private developers who were named as co-defendants. *Cine 42nd Street Theater Corp. v. Nederlander Organization Inc.*, 790 F.2d 1032, 1048 (2d Cir. 1986) ("[T]he private appellees acting in concert with the [urban development agency] are also entitled to state immunity."); *Scott v. City of Sioux City, Iowa*, 736 F.2d, at 1215 ("Since the state has authorized both the business relationship between the city and [the developer] and the city's zoning actions, it is clear that Metro Center's dealings with the council fall within the ambit of antitrust immunity.")

statute. (Pet. at 17.) Instead, the Court held that the challenged activities were authorized by state statute and that the requirements for state immunity were met:

> We look therefore to the authorizing South Carolina statutes to determine if the City regulated billboards pursuant to a "clearly articulated and affirmatively expressed state policy" which "clearly contemplate[s]" that the City may effect anti-competitive conduct, *and conclude that Town of Hallie's requirements are satisfied.*

Omni Outdoor Advertising v. Columbia Outdoor Advertising, 891 F.2d, at 1132 (emphasis added).

Further, the Fourth Circuit did not deny immunity as the result of a "careful review" of whether the challenged municipal conduct was authorized by state statute. Instead, it recognized a "conspiracy exception" which provided that immunity could be denied *even though* the *Town of Hallie*'s tests were satisfied *if* the defendants conspired solely to advance a private entity's anticompetitive purposes:

> *Although we conclude that the authorization granted by the State of South Carolina to its municipalities to regulate the billboard industry normally would be sufficient to clothe the municipalities with Parker immunity* in exercising that authority, we agree with Omni's contention that the *Parker* exemption is unavailable here. Implicit in the jury verdict was a finding that the City was not acting pursuant to the direction or purposes of the South Carolina statutes but conspired solely to further COA's commercial purposes to the detriment of competition in the billboard industry.

Id., at 1132-33 (emphasis added).

The Fourth Circuit's adoption of that exception in no way creates a conflict with the Tenth Circuit's decision here.

Because there was no evidence to support the alleged conspiracy to adopt an urban renewal plan to benefit BCED rather than to achieve the purposes of Colorado's urban renewal statute, the Tenth Circuit did not have to reach the issue of whether to recognize or apply such an exception.[8] Thus, the difference between the Fourth Circuit's decision in *Omni Outdoor Advertising* and the Tenth Circuit's decision here is that the *Omni* plaintiff supported its conspiracy allegations and the petitioner did not.

Evidence — or the lack of evidence — of a conspiracy also explains why the Eighth Circuit was "careful" in *Westborough Mall v. City of Cape Girardeau, Mo.*, 693 F.2d 733 (8th Cir. 1982) but "relaxed" in *Scott*. Although it considered its prior decision in *Westborough Mall* as well as the Fifth Circuit's "careful" review in *Whitworth v. Perkins*, 559 P.2d 378 (5th Cir. 1977), *vacated on other grounds*, 435 U.S. 992 (1978) *cert. denied* 440 U.S. 911 (1979), (*see* Pet. at 18), the Eighth Circuit in *Scott* reached a different outcome because it reviewed different evidence:

> A city council could conceivably violate the antitrust laws by entering into an agreement with a private developer to restrain trade. *See Westborough Mall v. City of Cape Girardeau, supra*, 693 F.2d at 746; . . . *Whitworth v. Perkins*, 559 F.2d 378, 381 (5th Cir. 1977), *vacated on other grounds*, 435 U.S. 992, 98 S. Ct. 1642, 56 L. Ed. 2d 81 (1978); Areeda, Antitrust Law, *supra*, ¶ 203.3 at 12-13. *In this case, however, the appellants have alleged no actions which appear outside the ambit of the city's antitrust immunity.*
>
> * * *

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[8] Nor did the petitioner contend in the lower courts that such an exception to the state action immunity doctrine should be applied. The petitioner sought the adoption and application of a co-conspirator exception to the *Noerr-Pennington* doctrine.

> In sum, *we do not believe a material issue of fact exists as to whether the city acted outside the state's authorization for antitrust purposes either* in its dealings with Metro Center prior to passing the challenged ordinances or in the procedures followed to enact them.

Scott v. City of Sioux City, Iowa, 736 F.2d, at 1214-1216 (emphasis added).[9]

Therefore, the Tenth Circuit's decision does not create a split among the circuits as to the proper method or level of applying this Court's decision in *Town of Hallie*, and the writ should be denied.

II. THE TENTH CIRCUIT'S NOERR-PENNINGTON DECISION DOES NOT CONSTITUTE AN OPPORTUNITY FOR THIS COURT TO CONSIDER THE CO-CONSPIRATOR EXCEPTION.

The Tenth Circuit did not decide whether or not to adopt a co-conspirator exception to the Noerr-Pennington doctrine. It did not need to reach that issue because it held that the petitioner had not come forward with sufficient facts to apply that exception to the instant case:

> We agree with the district court's conclusion that *the landowners have not submitted any evidence indicating that any "deal" was made, bribe taken, or illegal conspiracy formed* between the Municipal defendants and BCED.
>
> The landowners' allegations of secret meetings and covert agreements between the City and BCED

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[9] Contrary to the petitioner's assertions, the Fifth Circuit's decision in *Whitworth v. Perkins*, 559 F.2d 378 (5th Cir. 1977) does not shed any light on the proper standard for reviewing municipal actions because it was decided before this Court's decisions in *Town of Hallie* and *Lafayette*.

> *are not supported by sufficient evidence* of a conspiracy such that a possible co-conspirator exception [should] be considered. *Therefore, we need not address whether to adopt a "co-conspirator" exception to Noerr-Pennington.*

(App. Pet. at 13a) (emphasis added).

Therefore, this case would not offer the Court an opportunity to decide whether to adopt a co-conspirator exception to the *Noerr-Pennington* doctrine.

III. NO SUPREME COURT ISSUE WAS CREATED BY THE TENTH CIRCUIT'S DECISION ON PETITIONER'S CIVIL RIGHTS CLAIMS.

Nothing about the Tenth Circuit's decision on the petitioner's civil rights claims requires this Court's attention. The Tenth Circuit affirmed the district court's determination that the Plan was adopted by Denver's City Council to achieve the legitimate public purposes of eliminating blight and revitalizing downtown Denver. (App. Pet. at 16a-17a) Upholding the district court was merely a routine application of this Court's long-standing rule that civil rights challenges to legislation are satisfied if the legislation is rationally related to such a legitimate public purpose:

> [W]hen the legislature has spoken, the public interest has been declared in terms well-nigh conclusive . . . . But the means of executing the project are for [the legislature and the legislature] alone to determine, once the public purpose has been established.

Berman v. Parker, 348 U.S. 26, 32-33 (1954) (App. Pet. at 16a-17a).

The petitioner's attempt to transform this decision into an issue for this Court must fail. Its contention that this Court should adopt a different standard for reviewing the constitutionality of municipal legislative actions, as opposed to state

legislative actions, is a theory and a prayer. The petitioner "supports" its notion by citing only this Court's decision in *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978), an antitrust case discussing the applicability of state action immunity to municipalities. (*See* Pet. at 24.) As the Tenth Circuit correctly decided, whether the municipal actions were authorized by Colorado's urban renewal law is irrelevant to the petitioner's civil rights claim. (App. Pet. at 15a) *See Snowden v. Hughes*, 321 U.S. 1, 11 (1944) (An action's "illegality under the state statute can neither add to nor subtract from its constitutional validity.") Moreover, the petitioner does not cite to any decisions applying its theory that antitrust standards should be used to measure civil rights challenges.

Therefore, there is no reason for this Court to consider the Tenth Circuit's decision on the petitioner's civil rights claims.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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